United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7190

(42188)

To be argued by
MARK D. LEFKOWITZ

United States Court of Appeals
FOR THE SECOND CIRCUIT

CLAUDE L. HUNTLEY, JR.,

Appellant,

v.

Community School Board of BROOKLYN, New York District No. 14 and WILLIAM A. ROGERS in his official capacity as Community Superintendent of District No. 14,

Appellees.

ON APPEAL FROM A JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

PAGE

RULE CITED PAGE

STATUTES CITED

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Preliminary Statement

This is an appeal from a judgment and order of the United States District Court for the Eastern District of New York (WEINSTEIN, J.), entered on or about February 19, 1975, which dismissed the complaint. Appellant, an acting principal in an intermediate school in the New York City school system, brought an action under 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. §§ 2201 and 2202, challenging the termination of his employment.

Questions Presented

1. Was appellant entitled to a hearing before being terminated as acting principal of Intermediate School 33?

2. Was the determination of the District Court that the termination of appellant's employment as an acting principal was not racially motivated clearly erroneous?

Facts

(1)

Appellant, a black, was assigned to the position of acting principal of Intermediate School 33 (hereinafter, I.S. 33), Brooklyn, New York, effective September 9, 1970 (17a).* Mr. Huntley does not hold a New York City license for the position of Junior High School Principal or Intermediate School Principal (8a).

Appellant's appointment was objected to by the Council of Supervisory Associations of the Public Schools of New York City which had commenced an Article 78 proceeding against the Board of Education protesting the appointment of principals of intermediate schools without regard to an existing civil service list. That list had been initially promulgated as a junior high school principal list and eligible candidates had been appointed from that list to fill intermediate school positions.

The Court held (1) that intermediate schools in New York City are not junior high schools but are innovative, experimental and fundamentally different in purposes; and (2) that the Community School District and the City Board

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* Unless otherwise indicated, numbers in parentheses not proceeded by the letter "a" refer to pages in the Appellant's Appendix. Numbers in parentheses proceeded by the letter "a" refer to pages of Appellees' Supplemental Appendix.

of Education had acted lawfully in appointing appellant acting principal. The Court described appellant as a licensed teacher who had been certified by the State Education Department for appointment as an elementary school principal and who was eligible to be certified by the State Education Department to serve in any administrative-supervisory position up to and including Deputy Superintendent of Schools (8 New York Code of Rules and Regulations § 80.4). Appellant had satisfactorily served for four years as acting assistant principal of a New York City elementary school.

The Court concluded that it was immaterial that appellant was not on the civil service list for junior high school principal and that he did not have a license for that position. A junior high school list or license does not necessarily govern the appointment of an acting principal of an intermediate school. *Matter of Council of Supervisory Associations of the Public Schools of New York City, et al.* v. *Board of Education of the City of New York, et al.*, 65 Misc 2d 430 (Sup. Ct., Kings Co., 1971).

In their affidavit in support of appellees' cross motion for summary judgment herein, five members of the Community School Board stated that they supported appellant's appointment despite vigorous opposition from the Council of Supervisory Associations (38a-40a). This opposition included an attempt to hold the Community School Board in criminal contempt of court for allegedly violating a restraining order (45a-48a). These same five Board members voted for Mr. Huntley's termination (39a).

(2)

On June 5, 1973, appellant was terminated from his position as acting principal at I.S. 33. He commenced an action in the District Court alleging, *inter alia*, that this termination was racially motivated (8-9).

(3)

The trial was commenced on February 6, 1975. During the trial, documentary evidence, discussed by witnesses, was introduced which explained some of the reasons for the termination of appellant's employment as acting principal.

In a letter dated March 6, 1973, appellant had notified parents of the students at I.S. 33 that there was an "EMERGENCY SITUATION occurring in our school." He listed the reasons for this situation as (72):

"1. Too many false fire alarms.

2. Too many fires in various sections of our school.

3. Too many children roaming the halls.

4. Too many fights in school and after school, especially among girls.

5. Some teachers failing to do their jobs in the classrooms.

6. Too much disrespect for authority by the students.

7. Constant use of vile obscene and profane language by the students."

The thrust of this letter was a request for parent volunteers "to help patrol the corridors on all floors, visit classes to observe the teachers performing in the classroom, door patrol, and basement duty." There was an expressed need "to help insure the security and safety of the students" (72).

Various reports describing the conditions at I.S. 33 were issued for the years when appellant was acting principal, as well as for preceding and succeeding years. The number of requests made by parents to transfer their children from I.S. 33 increased steadily during the years of appellant's appointment (835). Of all the "middle-junior high

schools of District 14" more school aides were assigned to I.S. 33 in 1972-73 than to any other school. In fact, this figure was almost twice that of the next highest number for two other schools (836). There were 39 fires at I.S. 33 during the years of appellant's appoinment, while the only other school which had reported fires had 16 fires for the same time period (838). A record of "untoward" incidents (disturbances in the school created by outsiders, 592, 590) indicates that the total number of 14 which occurred during appellant's appointment surpassed the next highest number at two other schools during the same time period by a total of nine incidents each (839, 904).

Plaintiff's Case:

Claude L. Huntley, Jr., the appellant, testified that he was then employed as a remedial reading resource teacher at I.S. 1710 in District 13. He had been working there for two years (166). He had been employed in the New York City school system for 21 years (167).

Appellant testified concerning his appointment as acting principal and how that appointment was objected to by the Council of Supervisory Associations (175). He also discussed the occurrences of fires at his school during the period of his appointment. In order "to eliminate the reoccurrences of any type of fire", appellant made sure that the corridors were patrolled and free of children. An assistant principal was responsible for each floor. In addition, all rooms which were not in use, were locked (191).

Appellant "constantly" met with his faculty administrators "to go over these rules and regulations" (191). Apart from the monthly meetings with the faculty, emergency meetings were held, and each teacher and supervisor would then be responsible for making sure that the halls were cleared and the fire boxes were not tampered with (191-192).

There was an increase in the number of fires at the school during the latter part of his second year as acting principal after William A. Rogers had been appointed superintendent (193). Appellant had reported the fires to the district office (195). Mr. Rogers, however, did not give him any specific suggestion for curtailing the number of fires (195). Appellant had assigned students to "monitor" fireboxes and that this resulted in a decrease in the number of alarms and fires (196-197).

At the end of his second year, appellant received a satisfactory rating from Mr. Rogers and that up until that time he had never received "any verbal or written statement of dissatisfaction with any of [his] duties or performances" (197).

Mr. Rogers sent appellant a letter in which he stated that there had been a number of fires in the preceding year, and that he hoped the coming year "would be quieter" and that appellant "would be able to run the school effectively and efficiently in that particular level" (198).

Appellant discussed the fact that grievances had been filed against him by the teachers. These grievances dealt with class size and the transfer of teachers from the annex to the main building (204-205). By the spring of 1973, about 23 or 24 grievances had been filed against him, and the majority of these grievances were found to be justified (209).

In connection with a program "to study urban situations", leaders of a community gang were invited by the chairman of the social studies department to participate in the program (211). Mr. Rogers objected to this (211). Appellant saw "no harm to bring them in so that the children can learn the pathology of gang life" (212). The Police Department was also invited to participate (212).

Appellant had told the parents of the pupils that "there was a need for many of the [the] teachers to do a better

job'' and that he wanted the parents ''to come in and help'' (214). He "was constantly involved with community activities and the parents would tell [him] a lot of things [his] teachers would never hear about" (215).

Appellant testified that the reasons for a three day parent boycott in April, 1973, were (1) a desire that "the teachers . . . be more reasonable and . . . try to get along with the administration and community board''; (2) a concern over the quality of instruction; (3) a desire that the teachers "dress better"; and (4) "the overall picture of the school" (215). He attempted to improve relations between the teachers and parents by emphasizing to the faculty that as a community school, "each individual must be responsible to try to establish good relations with our parents in the community" (218).

Appellant had planned a reorganization of the school (219). He had discussed this plan with most of the members of the Board and Mr. Rogers who were present at the executive meeting of May 25, 1973 (221-222). At this meeting, one of the Board members, Mr. Strohmenger, informed appellant that "some teachers had come over to the district complaining about [him]", although he did not divulge any details (222). Appellant wanted to know the "ethnic make-up" of this group, and more specifically, if there were any black teachers among the complaining teachers (222). Mr. Strohmenger refused to give this information (222). Later that evening, after he had returned home, appellant was informed by a member of the Board, Leroy Fredericks, that the Board had decided to terminate him (223). A grievance was filed with the Chancellor on the ground that the termination was decided upon at an executive session of the Board (224).

As a result of this grievance, a "second termination meeting" was scheduled for June 5, 1973 (227). Appellant had not received any charges in writing prior to this meeting (227). He was able, however, to view the letter

which Mr. Rogers had written to the community school board, which letter recommended appellant's termination (227). Mr. Fredericks had shown his copy to appellant (227). The meeting held on June 5, 1973 was a public meeting and was well-attended by approximately three hundred people (228). The secretary of the Board read Mr. Roger's letter, to which appellant stated he did not have an opportunity to respond (228).

Appellant concluded his direct testimony by stating that he had not been warned that he might be terminated, and that Mr. Rogers had not offered any recommendations or suggestions regarding the school (229-230).

On cross-examination, appellant testified that the state of emergency which existed in the school was not his responsibility but was the responsibility of the same "disgruntled bunch" in the school who had initiated "all of the grievances" in the school and constituted some of the "weakest" teachers in the school (72, 236-237).

Appellant agreed that the ultimate responsibility for the school falls on the principal (237). He also stated that he was not responsible for the fires (238), and that his letter to the parents describing the emergency situation at the school was merely an effort on his part to elicit their support and involvement in the school (238). Appellant testified that a small minority of the teachers was responsible for the chaotic conditions at the school (239).

Appellant then discussed the letter of March 3, 1973 which he had sent to Mr. Rogers. He was asked what he meant when he stated in that letter that a "certain percentage of uncooperative UFT [United Federation of Teachers] members have formed a cabal whose sole objective is to get Huntley at all costs" (240). Appellant replied (240):

> "A cabal to get Huntley at all costs. As far as I'm concerned, what I meant by that, that they weren't

> concerned about a legitimate grievance. They weren't concerned about education of black and Spanish children. They weren't concerned about anything but to just come to school every day and to do the same thing they have been doing for many years and emasculating my children, and that I would not stand for."

Appellant stated that he "was resented by a certain number of teachers in the school" and that there was an effort "to maintain an institutionalization of racism to continue in the school" and that was why his appointment as the first black principal in the school was opposed (241). In explaining his concept of institutionalized racism, appellant testified that there are teachers in I.S. 33 who have the intent to disrupt education (245-246). Appellant was then asked, since he had been replaced by a black person, how could he claim that his termination was racially discriminatory (246)? His response was (246):

> "You see Ms. Rothman, what I'm saying is this: There are some people who will take a job even though it is an emotion that has been satisfied. I was not that ilk."

Appellant stated that the uncooperative teachers were frequently "running back and forth to the district office" because they "got a sympathetic ear from the district superintendent" (247-248).

Appellant was questioned concerning a letter he sent to the Chancellor in 1972 requesting a higher salary and citing racial discrimination as the reason for his then current salary (248). On the witness stand, appellant explained the letter as follows (249):

> "Naturally I wanted more money because that is a big intermediate school, two buildings involved, and so I say equal pay for equal work. That's all I say in that letter."

Appellant had requested an increment from the former Superintendent of District 14, Ralph Brande, who replied that appellant's salary "was in accordance with Board of Education regulations" (249). The following colloquy which then occurred between the Court and appellant indicated that he had tried to obtain more money (249-250):

> "The Court: I didn't understand that answer.
>
> The Witness: I said I tried, I was trying to get more money and I tried, but I didn't get it.
>
> The Court: Was he [Brande] right in this last letter?
>
> The Witness: According to the Board of Education regulations, he was right, yes.
>
> The Court: Had you checked that regulation before you wrote your letter?
>
> The Witness: I checked the regulation, but I felt that perhaps they could take my case under consideration.
>
> The Court: I don't understand that.
>
> The Witness: And maybe change the resolution, that's all it required, a Board of Ed resolution, to change that first salary step."

Appellant was then questioned concerning the charges of racism which he had set forth in letters to the Superintendent of District 14 (255). Appellant's response was that he went to the parents whom he believed should be asked to "help run the school" (255-256). He also "told the teachers to do their job . . . spend some time teaching rather than running to the district office, to the district superintendent . . . [and] make sure that all [their] children [were] in the classroom . . . at all times" (258).

Elizabeth Karpf, former guidance counselor at I.S. 33, testified that appellant "was never too busy . . . to talk to children" (274). Mrs. Karpf stated that "the parents [of the pupils at I.S. 33] thought appellant was wonderful" (277). The witness believed that appellant was a good

administrator, and that the teachers were to blame for the unsettled conditions at the school (283, 289).

James H. Miller, a teacher at I.S. 33, testified that he "was with [appellant] continuously in his efforts to upgrade the school, both as a member of administration and a former member of the informal groups which functioned in [the] school" (301). The witness described appellant as "totally accessible to teachers, parents, pupils, ministers, or anyone else in the area who chose to come into that building" (303). Mr. Miller attributed the problems which occurred during the period of appellant's appointment to a minority of vocal teachers (303-307).

Leroy Fredericks, a member of the Community School Board since its inception, stated that appellant "had expressed that he wasn't receiving the cooperation from the Community School Board", particularly Mr. Rogers (334-335). The witness testified concerning various disruptions and problems in other schools of the district, as well as the treatment accorded other principals and teachers (344-350). Mr. Fredericks pointed out that there was no discussion of the charges brought against appellant, which was a deviation from normal procedure. Moreover, the charges had not been formally presented to appellant prior to the "second termination" meeting of June 5, 1973 (349-350).

Mr.Fredericks stated that appellant was hired "because he was a black individual" (351). On cross-examination the witness was asked if he understood that since appellant was only an acting principal, he could not obtain tenure. Mr. Fredericks replied that he did not know this (359). When asked if he was "aware of the fact that since Mr. Rogers became Supervisor of District 14 the number of minority people in supervisory positions . . . increased from two to fourteen", Mr. Fredericks replied that although he had not been "completely" aware of this, he did know that there was an increase in the "number of supervisors of minorities" (359).

Caroline Hupe, stated that appellant's termination was "the most blatant racism that [she had] ever seen" (389). She was highly critical of the public meeting of June 5, 1973 where appellant was terminated (385-390). The witness admitted, however, that her opinion of appellant that he was a good administrator was not based upon personal observations but was based upon the opinions of parents she knew (396).

John J. O'Conner, former custodian engineer at I.S. 33, testified that to his knowledge, there were many more fires at I.S. 33 than at any other school (403). The witness also testified that there were many false alarms set off, up to twenty a day" (404). He described the "fire situation at the time [appellant] was principal" as "devastating" (404). He never saw the eighth grade students allegedly assigned to watch the fire boxes (404). The fires posed a significant threat to the safety of the school (406). After appellant was terminated, the number of fires at I.S. 33 decreased substantially (404).

Isaac Stokes, a reverend in Brooklyn, stated that his children attended I.S. 33 and that they "responded better" to appellant as a black principal than to previous white principals (424). He testified that "there is a certain kind of association to a black principal that you wouldn't necessarily get in the white principal" (424). When asked if he had made any prior statement "to the effect that the school is in better shape now than it was before", the witness replied (433-434):

> "Better disciplined, and mostly because of the fact that the teachers themselves had quit sabotaging the program. The teachers are now cooperating under Mr. Pretty than Mr. Huntley. In the begining that's what it seemed that it was."

Reverend Stokes testified that "there was a certain group of teachers that was out to get Mr. Huntley out of there at all costs" (435).

John Steel, a teacher at I.S. 33 from 1964 through 1973, testified that appellant identified with the children (438).

He stated (438):

> "[Appellant] gave the children a handshake, he said, 'Right on' to the children, he put his fist up in the air and the children would greet him with that same manner, and I observed this going on and had occasion to speak with some students, and they were saying, 'Hey, man, this Huntley is all right.' "

Mr. Steel testified concerning appellant's availability to teachers and parents, and his attempts to improve conditions at the school and to institute programs (439).

Defendants' Case:

Leonard S. Pretty, then acting principal of I.S. 33, testified that he was appointed principal immediately after appellant had been terminated (453). He described his general relationship with the Community School Board as "very cooperative" and his relationship with Mr. Rogers, the Community Superintendent, as "very harmonious" (453). There has been a decrease in school aid during his appointment. The school had been allocated 16,000 school aide hours which were then cut to 9,000 school aide hours (455).

Since June 6, 1973, the date of his appointment, only one grievance had been filed against him (455). Concerning his relationship with the teachers at I.S. 33, Mr. Pretty stated (455):

> "Well, again, we have a very harmonious working relationship. They give me support. They cooperate with me very well."

There were no teachers who caused any problems (456). When asked if there were any teachers in the school who resented taking orders from him because he was black,

Mr. Pretty replied. "If so, I do not know anything about it" (456).

Mr. Pretty stated that the school has been functioning normally and without crisis (456). There was only one fire during his appointment, and that occurred on a Sunday evening (456). When asked his opinion concerning the enlistment of parents to solve school problems, the witness replied (457):

> "I do not think parents should be called in to solve problems whereby teachers and the administration are supposed to solve. Because after all they are the ones who are getting paid to do the job."

Mr. Pretty did not know any teachers who were "intentionally disruptive or intentionally anxious to cause disruption" (458). Neither did he know of any conspiracies in the school (458).

William Rogers, Community Superintendent of Community School District 14, testified that he has been Community Superintendent since February, 1972, and that his responsibilities include "general administration of all 27 schools within the district, 2,000 professionals, 1,500 para-professionals and responsibility for the performance of teachers and children within the schools of District 14" (478).

When he was appointed Community Superintendent in February, 1972, only two members of minority groups held supervisory and administrative positions in District 14 (479). At the time of trial, that number, had increased to 14, all of whom were appointed by the Community School Board, upon Mr. Rogers' recommendation (479).

Mr. Rogers stated that the ultimate responsibility in determining whether a principal is performing satisfactorily lies with the Community Superintendent (480). The

witness testified that his district office staff visits the schools frequently and reports back to him. He stated that the schools "are constantly assessed as far as implementation of programs, [and] general tone of the school" (481).

Mr. Rogers stated that after having only assumed his position in February, 1972, he could not give any rating but satisfactory to appellant for his performance as principal as of June, 1972 (481-482). The witness stated (482):

> "There [had] been problems. I had talked to Mr. Huntley concerning these problems. There had been a number of fires. I had visited the school once and I didn't like the tone of the school. I thought there were too many children in the hallways.
>
> Generally speaking, I didn't think it was professional in such a short period of time to render any other decision but satisfactory."

Mr. Rogers stated that during the school-year 1972-1973, he spoke and met with appellant on "innumerable occasions" (483). He testified that the situation at I.S. 33 was "completely out of control" (483). He referred to a "tremendous morale problem" at the school, stating that both teachers and appellant were unhappy (483). Appellant had told him that the difficulties at school were attributable to "some type of a racial plot against him" and that Mr. Rogers was a party "to a scenario to end his career" (483-484).

With respect to the matter of having gangs brought into the school, Mr. Rogers' opinion was that this was not "sound educational policy" (484). He stated (484):

> "The youngsters in that community are fully aware of gangs, this is something not new to them. I also believed that they should not be put in a position where they would become some type of idol or something for the other youngsters in the community to look up to."

As a result of this incident, Mr. Rogers censured appellant and an assistant principal (484).

Mr. Rogers then proceeded to relate in detail specific incidents which illustrated the deteriorated condition of the school. Mr. Rogers testified that he had visited the school after appellant had reported that a fire had been contained in a teacher's closet. As Mr. Rogers discovered, the entire classroom had been completely "burned out" (485). The local fire department complained to Mr. Rogers that fire alarms were constantly being pulled and "that there seemed to be a situation that was out of control" (485). Mr. Rogers also stated that there were many grievances and a very serious morale problem (486). There was "total disorder on many occasions within the hallways of the school during instructional periods. Youngsters were constantly running around" (486). Mr. Rogers visited appellant one day and discovered fifty or sixty youngsters outside the main office, two of whom were wrestling on the floor (486). The witness discussed the situation with appellant as follows (487):

> "I did raise the question of why are all these youngsters here during instructional time and he told me he would tend to it immediately and I told him that I was tired of hearing reports of youngsters continually out in the hallways, continually moving out of the school; reports from the community that they were continually moving out of the school. I pointed out to him that he had an intermediate school with only two grades in the main building, you see. The sixth grade was in the annex, that he had fewer children to deal with than the other schools, he had adequate staff, and I felt that he was not doing the job that he was supposed to."

Mr. Rogers testified that he had made numerous suggestions to appellant in a number of conferences but that appellant constantly attributed blame to a racist plot and insisted upon running the school in his own way (487-488).

Mr. Rogers told appellant that he had more school aides than any other intermediate or junior high school in the district (488). Mr. Rogers stated that six is a full complement of assistant principals and that perhaps some people had been "designated" in supervisory positions without "budget positions" (591). The witness did not know of any intermediate school in District 14 which had more than six assistant principals (592). Similarly, he stated that no other intermediate school or junior high school was allotted as many school guard and school aide hours as I.S. 33. In fact, the number of hours was double the number of any other school (592-593).

With respect to the faculty under appellant, the members of the faculty stated to him that "they felt insecure, they felt unsafe, they felt physically threatened by force in and around the school. They felt that the safety of the school had deteriorated" (490). Faculty members had approached Mr. Rogers because appellant would not hear their grievances (490). Faculty members were concerned about conditions of the school and feared for the safety of the children (490). There were faculty members who transferred out of I.S. 33, and those who "literally begged [Mr. Rogers] to transfer them" (490). Mr. Rogers testified that after meetings with the teachers, he went to appellant "innumerable times" with the problems that had been discussed (564-565). He stated that he met with appellant more than he met "with all the other principals combined in the district during that year" (565). He described the school as looking "like an armed camp" (497).

Mr. Rogers was asked to describe current conditions at I.S. 33 under the new principal, Mr. Pretty. The witness stated that conditions have improved; there was one reported fire; the general tone of the school had improved; the children were in their classroom during instructional periods and instruction was going on; and lastly that those people in the community whom Mr. Rogers spoke with felt that their children were "relatively safe" at school (499).

It was Mr. Rogers' opinion that there was "very little education going on" at I.S. 33 during appellant's last year (491). Of all 27 schools in his district, Mr. Rogers testified that the problems at I.S. 33 were of greater magnitude" (492).

Mr. Rogers was then asked to explain his letter of June 1, 1973 wherein he recommended appellant's termination (466). He stated that during the school year 1972-1973, (1) appellant "had offered no education program at I.S. 33"; (2) staff relations were poor; and (3) the community was upset over conditions at the school (496-497, 35a-36a). Mr. Rogers testified that there were more requests for transfers by pupils from I.S. 33 than all other schools combined in the district (497).

Ralph T. Brande, former superintendent of Community School District No. 14, testified that he had rated appellant "satisfactory" for his first year as acting principal of I.S. 33 (599-600). However, he had doubts about his rating. He did not think that appellant "was functioning to the degree that [he] would have appreciated in carrying out his job", although he recognized appellant's lack of experience (600). He provided more support to appellant than any other principal in the district (600-601). He permitted appellant to staff his office with people whom appellant could rely upon, something which is not customarily done (600-601).

On cross-examination, Mr. Brande was asked if appellant had been appointed as part of an affirmative action effort (612). Mr. Brande replied that he had (612). The witness then indicated that had he been superintendent of District 14 the following year and if appellant's performance had not improved substantially, he would have rated him "unsatisfactory" (613). Mr. Brande had not recommended that appellant be appointed acting principal (608).

Thomas C. Strohmenger, a member of the Community

School Board, testified that he was a member of the Board at the time of appellant's appointment, and that he had voted to hire appellant (630). He discussed the opposition to appellant's appointment by the Council of Supervisory Associations and stated that an action for criminal contempt had been brought against the Board by the Council. In addition, Mr. Strohmenger had been harassed by the attorney for the Council regarding his future candidacy for admission to the Bar in light of a criminal contempt citation. He did not withdraw his support for appellant despite this opposition and despite the offer to drop the criminal contempt action if appellant were removed (631-633).

Mr. Strohmenger had voted to terminate appellant and the other members of the Board who had voted to hire appellant similarly voted to terminate him (633-634). Mr. Strohmenger stated that parents of students at I.S. 33 had complained to him about conditions at the school, as did teachers and the superintendent Mr. Rogers (634). The annex of I.S. 33, which was not directly under the supervision of appellant, had a better "tenor" than the main building of I.S. 33 which was under appellant's direct supervision (635).

The appellant had approached Mr. Strohmenger shortly before he was terminated and had told him that he needed assistance at the school. Appellant "expressed the feeling that he couldn't handle the situation the way it was over there, that it sort of had gotten out of hand" (640). The witness stated that the Board "felt that the situation wasn't going to get any better under [appellant] and that [their] only recourse . . . was to terminate him" (641).

Parents had complained about the fires at I.S. 33 as well as the lack of order (642). There was a complaint about the gang which appellant had invited into the school. The reverse effect had allegedly occurred—i.e, instead of disliking street gangs, students were joining them (642).

Mr. Rogers had told the Community School Board that he did not "like [appellant's] performance" (670). Mr. Rogers felt that appellant was not an "able" principal, and that he was not "someone who could do the job" (671).

Brother Robert F. Lally, president of the Community School Board, stated that as a member of the Board he had voted in favor of appellant's appointment (676). He too discussed the action brought by the Council of Supervisory Associations and how that organization would have dropped the criminal contempt proceeding in exchange for the Board withdrawing its appointment (677). However, the Board adhered to its decision (677).

Brother Lally had voted to terminate appellant (677). That decision was based upon a "culmination of . . . at least a year, or probably a year and a half of instances that had been occurring, and a gradual deterioration in the climate of I.S. 33" (678).

Brother Lally did not personally receive any complaints from any parents but there was a long list of students established at the end of the 1972 school year, requesting Superintendent to transfer them from I.S. 33 because of the "problem" there (683).

The witness was then asked what was the basic reason for terminating appellant. He responded that the basic reason was "the general chaotic state of the whole school" as well as Mr. Roger's recommendation. The Board concluded that appellant was not qualified, that he was not administering the school properly and that the "educational atmosphere [at I.S. 33 had] disappeared" (686).

Brother Lally was asked if Mr. Rogers, the Superintendent, was "objective and fair in his assessment of the situation", to which the witness replied (693-694):

> "A. Yes I do. Mr. Rogers, even during that entire year, 72-73, was in constant communication with Mr. Huntley.

> Mr. Huntley and himself were exchanging letters. Many times t[illegible] superintendent h[illegible]ne to I.S. 33 to see what he c[illegible]d do to help straighten out the situation, so it wasn't that Mr. Rogers gave up on the school just because Mr. Huntley was principal of the school."

When asked if Mr. Rogers ever expressed any b[illegible]s, the witness stated that he did not. During Mr. Rogers' administration two black principals, two Puerto Rican principals, and numerous black and Puerto Rican assistant principals were appointed (694).

Arthur Brodsky, a teacher at I.S. 33, testified that during the time when appellant was acting principal of I.S. 33, he was United Federation of Teachers (UFT) Chapter Chairman (735). He described conditions at I.S. 33, as "very chaotic", and that "very little education . . . was going on" (735). There were teachers at I.S. 33 who feared for their physical safety (735-736). Approximately fifty teachers complained to him about appellant and general conditions at I.S. 33 (736-737). Teacher morale was very low "as evidenced by a very high absentee rate" (738). The appellant had stated at a general meeting that the UFT contract did not apply at I.S. 33 (737).

Dorothy Straker, acting assistant principal in charge of the annex to I.S. 33 during appellant's appointment, stated that appellant "was always very cooperative with me in anything that we either planned jointly or that [she] wanted to implement at the Annex" (766). She also discussed many of the programs in existence during appellant's appointment (767-769).

At the end of the trial testimony, appellees' motion to dismiss was denied (797).

Appellant's attorneys then urged the Court to view appellant's case in an historical context, *i.e.,* to consider his claim for a hearing in light of *Chance* v. *Board of Examiners,* 458 F 2d 1167 (2nd Cir., 1972), and in light of an

alleged exclusion of black administrators from the school system. Mr. Meyerson, appellant's attorney, advanced the argument that "tenure as a basis for vesting property interest, and therefore, i.e., due process [a right to a hearing], is in fact discriminatory to black individuals" (799). Judge WEINSTEIN's response was (799-800):

> "There is no proof at all of that. The proof is that the plaintiff is a distinguished educator who has had extensive graduate courses, extensive experience, comes from a middle-class background, at least of this moment, lives in a middle class community. There is no proof whatsoever that he couldn't have obtained tenure and have been certified as a principal.
>
> * * *
>
> The record is completely devoid of any evidence to the contrary."

Judge WEINSTEIN stated that the historical argument supported by *Chance* has no application to appellant, a middle-class black who "has exactly the same paper record as others . . . acts like all other supervising personnel . . . speaks the same way . . . dresses the same way . . . [and] generally thinks the same way" (800).

Opinion Below

At the outset of his opinion, Judge WEINSTEIN stated that appellant had to "establish by a preponderance of the evidence that failure to retain him constituted a slur against his good name, reputation, honor, or integrity" and in that event a hearing would be required (87). Concerning the charge of racial discrimination, the Court stated that it was "incumbent upon plaintiff to show that a white person in his position, with his qualifications and under the same conditions would have been retained" (87-88).

After carefully reviewing the trial testimony, the Court defined the major issue to be whether the Community School Board's perceptions of appellant were honestly arrived at without racial prejudice (101). Judge WEINSTEIN concluded that those perceptions as they related to the fires and lack of discipline at the school were accurate (101-103).

The Court also recognized the hostility which existed between appellant and Community Superintendent Rogers. Judge WEINSTEIN stated, "Instead of attempting to work out his problems with the superintendent and with the school teachers, the plaintiff reacted by alleging racial persecution" (103). The Court concluded that due to the animosity and inability to cooperate, either appellant or Mr. Rogers had to leave (106). Judge WEINSTEIN stated (106-107):

> "It is apparent that the Superintendent rather than resign determined to recommend the firing of Mr. Huntley. This was not due to any racial animosity but due to an inability of the two to cooperate on an educational policy. That, the Superintendent can and could cooperate with black persons is indicated by the fact that, according to testimony, he has had no difficulty working with Mr. Huntley's successor, a black person, and with thirteen other supervisors in the district."[2]

Judge WEINSTEIN also concluded that the School Board was not racially motivated in terminating appellant. He noted that discrimination was exercised in appellant's *favor* when he was initially appointed and then retained for almost three years (107).

The Court, in denying appellant's claim for a hearing, noted that appellant has returned to the work which he was doing before his appointment to I.S. 33 and thus his professional career as a teacher and supervisor had not been adversely affected by his termination (108).

Lastly the Court rejected appellant's claim of racial discrimination, stating that no proof thereof had been presented (108).

POINT I

Appellant, an acting principal without tenure, was not entitled to a hearing prior to his termination.

(1)

It is a basic proposition of the law governing public employment that a hearing is not required prior to terminating an employee who has been appointed to either an acting, temporary, provisional or probationary position, unless such termination adversely affects the employee's "standing and associations in his community", his "good name, reputation, honor or integrity" or such termination violated a property right. *Board of Regents* v. *Roth,* 408 U.S. 564, 573-574, 577 (1972); *Russell* v. *Hodges,* 470 F. 2d 212 (2nd Cir., 1972).

There has been no showing by appellant that his termination imposed such a stigma on him that it violated his right to liberty and entitled him to a hearing under *Roth.* Appellant's termination has not adversely affected his professional career because he has returned to the work he had been doing prior to his appointment as acting principal (166, 108). Aside from conclusory allegations concerning damage to his professional standing, appellant has not demonstrated how his termination has negatively affected his career within the framework set forth in *Roth* and in this Court's decision in *Russell* v. *Hodges, supra,* 470 F. 2d 212 (1972).

In *Roth* the Supreme Court held that ordinarily a nontenured State employee could not invoke the Fourteenth Amendment to obtain a hearing prior to his dismissal. There the employee was hired as an assistant professor at

a state university for a fixed term of one academic year. The notice of his faculty appointment so specified. At the end of the one year period, he was not rehired for the next academic year. He was not given any hearing. The Court stated that the terms of respondent's appointment specifically provided that his employment was to terminate at the end of the academic year. He thus had no interest protected by the Fourteenth Amendment in reemployment for the next year. The Court concluded that he was not constitutionally entitled to a statement of reasons or to a hearing on the decision not to rehire him.

The Court did state that a hearing might be required under circumstances where an appointee's standing or reputation had been damaged. It offered some examples to illustrate this (*Board of Regents* v. *Roth, supra,* 408 U.S. 564, at pp. 573-574):

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case * * *. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor or integrity' is at stake.
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case."

In *Russell* v. *Hodges, supra,* this Court ruled that provisional and probationary employment do not entitle a government employee to a hearing prior to his termination. There plaintiffs, four former state and city employees, brought a civil rights action under 42 U.S.C. § 1983, alleging that their dismissals were unconstitutional because they were not provided "a hearing upon stated charges" prior to their termination. Of the four plaintiffs, two were terminated without a statement of reasons or a hearing, one received a statement of charges against him and a notice that he was being terminated, and the fourth, a New York City police trainee, was notified that he would be terminated after he had been injured during training. One of the plaintiffs had been charged with sleeping on duty, absence from his post without authorization and wearing improper attire. 470 F. 2d 214-215.

In construing the Supreme Court's decision in *Roth,* particularly that part of the opinion which required the plaintiff to demonstrate "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities") this Court stated (470 F. 2d 216):

> "The Court made clear that by the latter phrase it meant something more than the disadvantage inevitably entailed when a person 'simply is not rehired in one job but remains as free as before to seek another.' 408 U.S. at 575, 92 S. Ct. at 2708. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' 408 U.S. at 574 n. 13, 92 S. Ct. at 2708. 'Property' interests, the Court held include not merely contractual or statutory rights to continued employment but rights acquired under a '*de facto* tenure program, resulting from 'the existence of rules and understandings, promulgated and

> fostered by state officials, that may justify his legitimate claim of entitlement to continued employmente,' 408 U.S. at 600, 602, 92 S. Ct. at 2700. But the Court explained, that a mere unilateral expectation' of continued employment was not sufficient 'property' to trigger due process guarantees, 408 U.S. at 577, 603, 92 S. Ct. at 2701."

In dismissing the plaintiffs' claims to a right to a hearing, this Court concluded that they did not have any "property" interest in continued employment. There was no contractual or statutory claim or even a claim of *de facto* tenure before the Court. See also *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), fn. 2 at p. 167.

In *Hunter* v. *Model Cities Administration,* N.Y.L.J., May 24, 1973, p. 17 col. 4 (2d Cir., Docket #72-1881, n.o.r.), this court rejected the argument that a plaintiff's dismissal had so damaged his reputation as to require a due process hearing and it affirmed, without opinion, the District Court's dismissal of the complaint. The plaintiff had been fired because employees under his direct supervision had been dismissed for signing time sheets and not actually working and the plaintiff claimed that the complaints made against him were "tantamount to charging that [he] was a direct participant in the fraud." (*Hunter,* App. Br., p. 11).

In *Canty* v. *Board of Education,* 448 F. 2d 428 (2d Cir., 1971); vacated and remanded, 408 U.S. 940 (1972); on remand, 470 F.2d 1111 (1972), cert. den. 412 U.S. 907 (1973), the plaintiff, a regular substitute teacher, had been accused of general incompetence, unexplained absences, sleeping when he should have been in class and the use of physical force on a child. This Court, interpreting the Supreme Court decisions in *Roth* and *Perry* v. *Sindermann,* 408 U.S. 593 (1972), affirmed the dismissal of the complaint and rejected Mr. Canty's claim that he was en-

titled to a trial-type hearing before being dismissed. Cf. *Lombard* v. *Board of Education,* 502 F.2d 631 (2d Cir., 1974), cert. den. 43 L.Ed. 2d 656 (1975).

In *Buhr* v. *Buffalo Public School District No. 38,* 509 F. 2d 1196 (8th Cir., 1974), a nontenured teacher who was denied continued employment brought an action against the school district, alleging violations of her Fourteenth Amendment rights to both procedural and substantive due process of law. The Court, in affirming the District Court's granting of summary judgment dismissing the complaint, ruled that the charges brought against plaintiff, *i.e.,* that "she was the cause of certain emotional and nervous stress and tension on the part of some of the students", would not adversely affect her professional standing absent a hearing. In deciding her claim of a violation of substantive due process, the Court stated (509 F. 2d at p. 1202):

> "Since North Dakota law provides only that she [plaintiff] be told the reasons for her termination but does not entitle her to a full-dress hearing in order to rebut those 'charges,' we could scarcely overturn the school board's decision on insufficiency of the evidence grounds. Indeed, although North Dakota law gave her the right to learn the reasons for her nonretention, *see supra,* her employment could have been terminated for no reason at all without offending the Constitution. *Roth, supra;* Frazier v. Curators of Missouri, 495 F. 2d 1149 (8th Cir. 1974); Scheelhaase v. Woodbury Central Community School District, 488 F. 2d 237 (8th Cir. 1973) cert. denied, 417 U.S. 969, 94 S. Ct. 3173, 41 L.Ed. 2d 1140 (1974); Freeman v. Gound Special School District, 405 F. 2d 1153 (8th Cir.), cert. denied, 396 U.S. 843, 90 S. Ct. 61, 24 L.Ed. 2d 93 (1969). Without wishing to encourage school boards to retreat behind a veil of silence in such situations, we must conclude that where a teacher can constitutionally be dismissed for no reason, he or she

> can be dismissed for reasons unsupported by factual evidence. In other words, to the extent that our cases recognize a constitutional right to *substantive* due process, that right as expressed by the Seventh Circuit, 'is no greater than the right to procedural due process.' *Jeffries* v. *Turkey Run Consolidated School District, supra,* 492 F. 2d at 4."

Interestingly, in *Buhr,* under North Dakota law, there is no formal tenure system. Each public school teacher is employed under a yearly contract which the school district may or not renew. 509 F. 2d 1198, fn. 1. See also, *Kennedy* v. *Engel,* 348 F.Supp. 1142 (E.D. N.Y., 1972).

Relying heavily upon Mr. Rogers' letter of June 1, 1973, recommending appellant's termination, appellant concludes that his professional career has been adversely affected (App. Br., p. 12). We submit, first, that stated reasons need not be presented to an acting appointee prior to his termination, and, second, that the reasons which are set forth in this letter all relate to a failure by appellant to meet the particular standards minimally required of a principal of an intermediate school as perceived by the Local School Board and the District Superintendent. Ultimately, it is within the discretion of the Board and the Superintendent to determine whether the best interests of the school, its students and faculty, as well as the community, are best served by retaining an acting principal. There is no abuse of that discretion where here appellant's termination was not based upon his exercise of a Constitutional right (cf. *Perry* v. *Sindermann,* 408 U.S. 593 [1972]), but was predicated upon findings of fact that, during appellant's appointment, I.S. 33 was a school in bedlam, troubled by (1) an abnormal number of fires and false alarms, (2) numerous incidents of assaults, (3) a poorly disciplined student body, many of whom menacingly roamed the halls during classroom instruction, (4) low morale among faculty, characterized by numerous filed

grievances, (5) a lack of cooperation between principal and District Superintendent, and, lastly, (6) community dissatisfaction as evidenced by numerous requests for student transfers from the school as well as a boycott. These findings of fact were fully supported by record testimony of both appellant's and appellees' witnesses. There has been no demonstration by appellant that these findings of fact are clearly erroneous. Federal Rules Civil Procedure, Rule 52, subd. a.

Finally, we do not read *Roth, Russell* v. *Hodges,* and other decisions of this Circuit discussed above, as making cognizable (and hence requiring a hearing where the governmental employer must provide justification) every claim that a plaintiff's termination *may* result in his being foreclosed from a similar type of position. Rather, these cases set forth a stricter standard, focusing upon moral stigma, reputation, honesty and integrity, much graver considerations than the *mere possibility* of not being hired to do essentially similar work. See *Roth, supra,* 408 U.S. at p. 574 fn. 13. Every termination bears negative results or negative connotations in one way or another. But that test would be too simple. Here the reason for appellant's termination related solely to his inability to control conditions at a particular school during a particular time. Appellant has not shown specifically how his career has been effectively obstructed by his termination. In fact, his employment within his profession for the past two years rebuts any possible inference to the contrary.

(3)

The termination of appellant's appointment as acting principal did not violate any property right under New York law. See *Matter of Bergstein* v. *Board of Education,* 34 NY 2d 318, 322 (1974); *Matter of Gordon* v. *SUNY at Buffalo,* 35 AD 2d 868 (3rd Dept., 1970), affd. 29 NY 2d 684 (1971). See also *Clausen* v. *Board of Education of City*

of New York, 39 AD 2d 708 (2d Dept., 1972). A temporary or provisional appointment to a competitive position has no right to continue in that position. *Matter of Hilsenrad* v. *Miller*, 284 N.Y. 445, 450-451 (1940); *Koso* v. *Greene*, 260 N.Y. 491, 494-495 (1933); *Matter of Riggi* v. *Blessing*, 9 AD 2d 423 (3rd Dept., 1959), affd. 10 NY 2d 917 (1961); cf. *Matter of Board of Education of the City of New York* v. *Nyquist*, 31 NY 2d 468 (1973).

POINT II

The determination by the District Court that appellant's dismissal was not racially motivated was not clearly erroneous.

(1)

Judge WEINSTEIN's findings of fact included a determination that the Community School Board and Superintendent Rogers were not racially motivated in terminating appellant. Appellant has not presented any evidence that would demonstrate that this determination was clearly erroneous. Fed. Rules Civil Proc., Rule 52, subd. a. Appellant has made conclusory assertions that despite the fact that he had initially been appointed pursuant to an "affirmative action" policy he "was not given the supportive services and training which were necessary to assist him in performing his duties, supportive services and training which he would have otherwise received if he was white and which white personnel in similar positions did receive" (App. Br., p. 66). Appellant concludes that it was naturally forseeable that he would fail in his efforts and that this constituted racial discrimination (App. Br., p. 67). The record evidence does not support these assertions.

Mr. Rogers, the present Community Superintendent, and Mr. Brande, the former Superintendent, testified that appellant did receive the necessary staff support and, in fact, had more assistant principals and school guard and school aide

hours than other schools in the district. Appellant was even permitted to staff his office with people whom he wanted to bring in (591-593, 600-601).

Mr. Rogers met with appellant in an attempt to deal with the problems at the school. The Superintendent's willingness to cooperate with appellant to improve conditions at the school was expressed in his letter to appellant dated September 13, 1972 (19a). Mr. Roger's record testimony, and that of other witnesses, supports this expressed intention.

Appellant's belief that there were faculty members, as well as Mr. Rogers, who were racially biased, and that this bias was the reason for his termination, was candidly expressed in a letter dated March 3, 1973, addressed to Mr. Rogers. In the letter, a highly emotional and bitter communication, appellant denounced an alleged "cabal" which was organized to "GET HUNTLEY AT ALL COSTS". He attributed the cause of his problems at the school to a racist plot, and asked Mr. Rogers if he personally was "recoiling at the thought of a qualified BLACK MAN challenging the establishment and its educational political implications?" (22a-27a).

These assertions were never proved at trial. Appellant's credibility on this very point was significantly weakened by his trial testimony. At trial, he stated that in 1972 he had requested a higher salary on the ground that, as far as compensation was concerned, he had been racially discriminated against. He admitted, however, that his request was merely an attempt "to get more money" (240-250).

Appellant's letter of March 6, 1973, addressed to the parents of the pupils at I.S. 33, can only be construed as an admission that he was unable to control conditions at the school (32a-33a, 72). Despite all the professional help which was made available to appellant, he was still unable to effectively control the school and had to solicit help from the parents in the community. Although today com-

munity participation is encouraged, the line must be drawn where the day to day administration of the school is involved. If an emergency situation has arisen in a school, the responsibility for correcting the situation lies directly and primarily with the administration of the school.

The incidents outlined in this letter, as well as others (*e.g.*, the gang members who visited the school with appellant's approval), compounded by the fear for physical safety and the very low morale among faculty members, persuaded Mr. Rogers and the Local School Board members that appellant was no longer able to effectively administer the school. These reasons would certainly have applied equally to appellant if he was white. Moreover, the charge that these reasons were in the first instance a guise for racial prejudice was completely rebutted by the following evidence:

Members of the Local School Board who had initially voted in favor of appellant's appointment, despite the vigorous opposition of the Council of Supervisory Associations, which opposition was accompanied by personal threats, voted to terminate appellant. These same individuals, who had believed that appellant was qualified for the job in 1970, were convinced by late spring of 1973 that he was unable to control the school. Although perhaps initially motivated to appoint appellant pursuant to an affirmative action policy, they subsequently realized that his retention was inconsistent with their primary responsibility to insure that the school was being administered effectively and without turmoil (38a-40a).

The fact that the Community School Board and appellee Rogers immediately appointed another black acting principal to replace appellant would seem to completely rebut any inference of bias. Mr. Pretty, the new principal, testified at trial that his general relationship with the Community School Board, as well as with Mr. Rogers, was harmonious and cooperative. He also stated that he had a

cooperative relationship with the teachers at I.S. 33, and that only one grievance had been filed against him since the date of his appointment. Mr. Pretty did not know of any racial conspiracies in his school, or of any teachers who were intentionally disruptive. He stated that the school was functioning normally, without crisis, and that there had been only one fire since his appointment (453-458). Mr. Roger's trial testimony confirmed Mr. Pretty's observations regarding conditions at I.S. 33 (499).

Further rebutting the charge that the Community School Board and the District Superintendent were racially biased is the fact that, after Mr. Rogers' appointment in February, 1972, thirteen members of minority groups were appointed to supervisory and administrative positions in the School District (34a). Brother Lally testified at trial that during Mr. Rogers' administration two black principals, two Puerto Rican principals, and numerous black and Puerto Rican assistant principals were appointed (694).

In *Williams* v. *Hyde County Board of Education,* 490 F. 2d 1231 (4th Cir., 1974), the plaintiff, a nontenured teacher, alleged that the decision not to renew his employment contract was racially motivated. The Court found that in view of the fact that the plaintiff's dismissal had been initially recommended by a black principal and by an advisory council composed of blacks and whites, and in view of the fact that plaintiff had a record of deficiencies, the decision not to renew plaintiff's contract was not because of his race or because of his participation in a black teacher's association. Cf. *Watts* v. *Board of Curators, University of Missouri,* 495 F. 2d 384 (8th Cir., 1974); *Robinson* v. *Jefferson County Board of Education,* 485 F. 2d 1381 (5th Cir., 1973).

Having not presented any evidence to substantiate the charge of racial bias, appellant has failed to show any unconstitutional basis for his termination that would entitle him to a hearing.

One final word is in order in regard to appellant's claim (App. Br., p. 31) that the fact he is black entitles him to a hearing. We do not read *Chance* as in any sense holding that an individual such as appellant, because of his race, is entitled to a hearing that a white employee would not be entitled to under the exact same circumstances. *Chance,* at least as we read it, does not insulate minority employees from accountability, or accord to them procedural rights not accorded to other employees.

CONCLUSION

The order and judgment appealed from should be affirmed, with costs.

Respectfully submitted,

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(58206)

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

Joel Ehrenkranz

being duly sworn, says, that on the 25 day of June, 19 75

at No. 1790 Broadway in the Borough of Manhattan in The City of New York, he served three copies of the annexed Appellee's Brief upon Nathaniel L. Dyer, James L. Meyerson Esq., the attorney for the Appellants in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Joel Ehrenkranz

Sworn to before me, this 25th day of June, 19 75

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
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